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In the

Supreme Court of the United States

No. 74-754, 1974 Term

UNITED STATES OF AMERICA

Appellant,

v.

ROY MANDUJANO,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

STATEMENT AND BRIEF AS AMICUS CURIÆ FOR RICHARD O. KELLY

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STATEMENT OF AMICUS CURIÆ FOR RICHARD O. KELLY

Pursuant to Rule 42(2) of this Court, Richard O. Kelly respectfully files the annexed brief as amicus curiae in the above styled case.

Counsel for both Appellant and Appellee have consented to the request for leave to file a brief. Copies of those consents are attached to this motion.

INTEREST OF AMICUS CURIÆ

Richard O. Kelly was found guilty of one count of perjury

under 18 U.S.C. §1623 in December of 1973. His conviction was appealed to the United States Court of Appeals for the Ninth Circuit, where it was submitted upon oral argument on August 10, 1974. In August of 1975, that Court entered its interim order that the submission was vacated pending the action by this Court in the application for certiorari filed by the United States in *United States v. Wong*.

In his appeal, Richard O. Kelly contended, inter alia, that his grand jury testimony should have been supressed in that he appeared before the grand jury in the belief that he was an ordinary witness, although the trial court has found he was even then a virtual defendant, interrogated about casual conversations of more than four years before and given no warning that he was a target of the investigation and only an incomplete Miranda Warning. He was indicted upon two counts of perjury (acquitted as to one) only six months after he had refused to plead guilty or even plea bargain as to four other counts of mail fraud and conspiracy, but had filed a motion for speedy trial. He, along with three other Defendants, who also refused to plead guilty, were then indicted for perjury, with the mail fraud charges being dismissed.

Respectfully submitted,

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Attorney for Richard O. Kelly

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BRIEF AS AMICUS CURIÆ FOR RICHARD O. KELLY

INTEREST OF AMICUS CURIÆ

The personal interest of the amicus curiae in the subject matter of this case is described in the foregoing statement, supra.

ARGUMENT

A. HISTORY AND USAGE OF 18 U.S.C. §1623.

18 U.S.C. §1623 was enacted in 1970 as a part of the Organized Crime Control Act, with the admitted purpose of facilitating convictions for perjury.[1] This was accomplished,

[1] ". . . facilitate Federal perjury prosecutions." 1970 U.S. Code Cong. and Ad. News 4008.

primarily, by eliminating what is commonly called "the two witness rule" as an evidence requirement. The position advocated by this brief will be that the new statute is so effective that it is actually capable of obtaining convictions where there is no perjury, to the point that some reasonable safeguards are required to protect both interests.

The success which the new statute has enjoyed can be measured, to some extent at least, by a numerical count of the reported Federal cases involving perjury. Such a count, presented in tabular form, reveals the following for the past five decades:

1930 - 1939	22	reported perjury cases
1940 - 1949	21	reported perjury cases
1950 - 1959	68	reported perjury cases
1960 - 1969	68	reported perjury cases
1970 - Apr. 1975	97	reported perjury cases

If the 1970 decade be regarded as half over, and if the rate only stays constant without further increase, then the perjury cases for the 1970 - 1979 decade could be projected at 194 cases. The perjury cases, then, in this decade alone would exceed the cumulative total of the past forty years.

Moreover, if these cases be examined it will be observed that §1623 is now used almost exclusively. For the years 1974 and 1975, to date, there are 29 reported perjury cases. All were brought under §1623. To be sure, the newer statute is limited to perjury in Federal proceedings or before grand juries, but these are the usual places for perjury to occur.

In the normal situation, then, the United States would have

a choice as to the statute it employed. If the two witness rule should be a problem, then indictment might be had under §1623. On the other hand, if the witness has recanted so as to bar prosecution under §1623, then indictment could still be accomplished under §1621. The Second Circuit found this contention "not a little disturbing," but was unable to disagree with its accuracy. *U.S. v. Kahn*, (2d Cir. 1973) 472 F.2d 272.

B. ABUSES IN PRACTICE.

(1) Grand Jury System.

Grand Juries tend to fall into two basic types. There are still those which conduct most searching and thorough investigations into complex areas of many types. There are other grand juries, however, which receive only the results of investigations already completed and return indictments already drawn. While the grand jury may have begun as a protection to all citizens from capricious prosecution, regrettably the second type of grand jury has become, by far, the more typical. See, *Knudsen, Pretrial Disclosure of Federal Grand Jury Testimony*, 60 F.R.D. 237 (1974); *Kaufman, The Grand Jury - Its Roles and Its Powers*, 17 F.R.D. 331 (1955).

The grand jury system has come under increasing criticism, being termed no more than the prosecutor's alter ego, with little to do beyond ratify proposed indictments. *Antell, The Modern Grand Jury: Benighted Super-Government*, 51 A.B.A.J. 153 (1965); *Younger, The Grand Jury Under Attack*, 46 J. Crim. L. 26 (1955); *Lieck, Abolition of the Grand Jury in England*, 25 J. Crim. L. 623 (1935). This attack extends be-

yond the writings of legal scholars to the public generally. See, for example, the scathing attack in the August 1975 edition of *Playboy* magazine in an article entitled, "Vengeance Under the Law."

(2) Setting Up of All Targets for Perjury.

In the more normal course of events, the investigation has already been conducted by one or more agencies of the Government, usually under some active guidance from the prosecution. The central figures and the details of the crime are known. On the boundaries stand the fringe characters, only tangentally involved. The decision as to each of those is essentially a subjective one. Being human, with likes and dislikes, prejudices and emotions, these factors are difficult to ignore in making such a decision. An uncooperative or disagreeable person may find himself included with the target defendants more for reasons of personality than evidence.

In theory, of course, no real harm could result since such a defendant will enjoy the presumption of innocence until the trier of fact ultimately exonerates him for lack of evidence. Unfortunately, that analysis does violence to the reality. First, the presumption of innocence is limited to judicial mechanics. As for the remainder of the world it would be more accurate to speak in terms of an almost irrebuttable presumption of guilt that begins with the first newspaper story.

As to the second, it is §1623 which now permits the prosecution to enhance greatly its chances of conviction even with a weak case. All such target defendants are called before

the grand jury and interrogated over conversations, meetings or similar details of as far back as four or more years.[2]

The human memory just is not perfect enough to recall ancient details with great accuracy. This fact is not only common knowledge, but is supported by authoritative studies in that field. 63 *Gen. Psychological Rev.* 81; 11 *Journal of Verbal Learning,* 561 (1972), *Rehearsal and Transfer to Long Term Memory,* 64 *Psychological Review* 49 (1957) *Interference and Forgetting.*

> "After a relatively short time, we can no longer bring to mind such facts as dates, time of day, days in a week, or place of occurrence. With further lapse of time, the sequence of events begins to become rearranged . . . details confuse or fuse together to form new units." *Trankell, Reliability of Evidence,* 21 (1972)

It is to be anticipated, then, that there will be conflicts and discrepancies between the target defendant's testimony on at least several points of detail and chronology. He may even forget entirely some events to the point of denial.[3] The prosecutor, having all facts and details close at hand, can be quick to seize upon any such conflict in testimony. He may then, as a matter of tactics, add separate perjury counts to the main indictment or hold the threat of a subsequent perjury indictment as a reserve to induce a guilty plea.

The target defendant has, like as not, actually given false

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[2] See, for example, illustrations in *U.S. v. Devitt* (7th Cir. 1974) 499 F.2d 135 (8 years); *U.S. v. Isaacs* (7th Cir. 1974) 493 F.2d 1124 (10 years; *U.S. v. Paolicelli* (4th Cir. 1974) 505 F.2d 971 (5 years).

[3] It will do the Defendant no good to answer "I do not recall" rather than an outright denial, for such an answer will also support a perjury conviction upon the reasoning that he did recall, thus either denial is false, *U.S. v. Devitt,* (7th Cir. 1974) 499 F.2d 135.

testimony however innocently it was done. He must, therefore, fall back to the defenses that it was not knowingly false at the time or that it was upon an immaterial matter.

Such a defendant may well be concerned that his case will necessarily turn, in the main, upon subjective inferences going to his state of mind. Moreover, this analysis will take place in an atmosphere poisoned by the main criminal activity that was under investigation. The Defendant may well also be but one of many, joined with the central figures by a conspiracy count. Add to those factors, the additional considerations of the expense and time following quite adverse publicity, and there is no doubt but that even an innocent man would give serious consideration to a negotiated guilty plea to a crime he did not commit.

C. MATERIALITY IS INEFFECTIVE AS A CHECK UPON ABUSE.

Although materiality was retained by Congress as an element in §1623 perjury, it has come to be defined as broadly as to be useless as a check against abuse.

Prior to 1927, there was no universally applied test for materiality in perjury before a grand jury. It was more closely examined, and sometimes found not to exist.[4] In 1927, however, the Second Circuit issued its opinion in *Carroll v. U.S.*, (2d Cir. 1927) 16 F.2d 951, and in so doing, ennunciated the test that has come to be universally applied.

Defendant Carroll was testifying to the grand jury about

[4] Examples of such pre-1927 cases are *Clayton v. U.S.* (4th Cir. 1922) 284 Fed. 537; *Epstein v. U.S.* (2d Cir. 1921) 271 Fed. 282.

a party he had given. The Government believed he had used a tub full of champagne (this being in the Volstead era) complete with a nude girl in the tub. Carroll insisted there was no girl, and the tub contained only ginger ale. When indicted for perjury, he contended that the identity of the girl was immaterial to the liquor violation under investigation. The Court disagreed, since the girl, if known, would presumably have some first hand knowledge as to the type of liquid in which she was seated.

After this clearly correct holding, the court went on to justify its decision with the language so often quoted even today:

> "Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury may be material in that it tends to influence or impede the course of the investigation.
>
> . . . the test of materiality in a grand jury investigation is whether the false testimony has a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation, and if it does, an indictment for perjury may be predicated upon it." *Carroll v. U.S.*, (2d Cir. 1927) 16 F.2d 951, 953.

Examples of more modern cases following the *Carroll* standard include *U.S. v. Paolicelli*, (4th Cir. 1974) 505 F.2d

971; *U.S. v. Makris* (5th Cir. 1973) 483 F.2d 1082; *U.S. v. Lazaros*, (6th Cir. 1973) 480 F.2d 1180.[5]

The problem with the *Carroll* test as a check against abuse is that it is so broad, little will be found so immaterial as to avoid perjury for false statements. It is somewhat difficult to imagine testimony which would be held immaterial under *Carroll* since almost anything could have at least the tendency to impede if not influence the investigation.[6]

For a brief period it seemed the Second Circuit might be moving to a stronger standard of materiality by requiring a showing that ". . . a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred." *U.S. v. Birrell* (2d Cir. 1972) 470 F.2d 113, 115; *U.S. v. Freedman* (2d Cir. 1971) 445 F.2d 1220, 1227. It now appears, however, that the second circuit has retreated back to *Carroll - U.S. v. Mancuso* (2d Cir. 1973) 485 F.2d 275. Materiality is probably the most asserted and least successful point in all perjury appeals. It can give little solace to a defendant charged with perjury.

D. WRONGFUL INTENT IS A SUBJECTIVE STANDARD INEFFECTIVE AS A CHECK UPON ABUSE.

§1623 requires that the false statement be "knowingly" made while §1621 uses the term "willfully." One court has indicated

[5] In an adversary proceeding, materiality is tested differently, "the capacity to influence the trier of fact upon the issues before it." *U.S. v. Edwards* (8th Cir. 1971) 443 F.2d 1286.

[6] It is of no consequence that the grand jury was not impeded because it already knew the truth. *U.S. v. Lee*, 509 F.2d 645.

there may be some differences in the terms. *U.S. v. Gross*, (3d Cir. 1975) 511 F.2d 910. The difference, if any, would seem to be more apparent than real since all circuits have defined "willfully" under §1621 to mean that the Defendant then knew he was giving false testimony. *Laplaca v. U.S.* (1st Cir. 1965) 354 F.2d 56 ("Did not believe the statements when made to be true."); *U.S. v. Sweig* (2d Cir. 1971) 441 F.2d 114 ("Knowledge of the falsity of his statements."); *U.S. v. Rose* (3d Cir. 1954) 215 F.2d 617 ("Must have believed what he swore to was false."); *U.S. v. Breach* (4th Cir. 1961) 296 F.2d 153 ("Accused must have known . . . what he denied."); *U.S. v. Edmondson* (5th Cir. 1969) 410 F.2d 670 ("Must not have believed the statement to be true."); *U.S. v. Booth* (6th Cir. 1972) 454 F.2d 318 ("Intent to testify falsely."); *U.S. v. Rivera* (7th Cir. 1971) 448 F.2d 757 ("Believe as to falsity of his testimony."); *U.S. v. Steinhibler* (8th Cir. 1973) 484 F.2d 386 ("A certain and clear perception of the falsity."); *U.S. v. Clizer* (9th Cir. 1972) 464 F.2d 121 ("Must have remembered the incident."); *Estep v. U.S.* (10th Cir. 1943) 140 F.2d 40 ("Purposeful misrepresentation."); *Young v. U.S.* (Dist.Col. Cir. 1954) 212 F.2d 236 ("A belief as to the falsity.").

Barring a confession, recantation or something similar there simply can be no direct evidence regarding a state of mind. It is as impossible for the prosecution to prove to a certainty that the Defendant remembered as it is for the Defendant to prove he did not. Instead, the wrongful intent must be inferred from the collateral facts and circumstantial evidence. *U.S. v. Clizer* (9th Cir. 1972 464 F.2d 121; *U.S. v. Rivera* (7th Cir. 1971) 448 F.2d 757; *U.S. v. Sweig* (2d Cir. 1971) 441 F.2d 114.

To reach such collateral facts and circumstantial evidence the prosecution will necessarily be permitted to introduce some evidence of the major crime under the grand jury's investigation. Even with the most careful instructions, the side effects of this type of evidence could still cause some innocent defendants to be found guilty. If practical, a more objective counterbalance against abuse would be preferrable to the subject analysis of another man's mind.

E. APPROPRIATE WARNINGS PROVIDE THE MORE EQUITY BALANCE.

(1) Interests to be Protected.

The grand jury system still has utility and value which should be protected. While zealous prosecutors may gain some tactical advantages in the short run, the long term effect will inevitably be for all witnesses to have a growing reluctance to testify. Defense attorneys who specialize in the area (and tend to be former prosecutors themselves) will be disinclined to permit their clients to participate fully before grand juries. As one court put it,

> ". . . witnesses who are compelled to testify will testify more freely if they know that they will not be subject to prosecution for perjury simply because an equally honest witness may well have a different recollection of the same event." *U.S. v. Marchisio* (2d Cir. 1965) 344 F.2d 653.

The result, then, should be a fair balance which will permit both interests to be served without severe restrictions upon either.

(2) The Growing Concern Against Abuse.

From time to time in earlier cases, some courts dealt with

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contentions of abuse, but it is only within the past few years that there has been a significant evidence in the opinions of a growing concern about abuse and some affirmative effort to avoid the effects.

Defendants seeking to raise the abuse issue first talked in terms of entrapment, contending they were brought before the grand jury solely to lay a predicate for perjury. Such facts, even if true, fall short of the guidelines of classic entrapment as set by this court. *Sorrells v. U.S.* (1932) 287 U.S. 435. The problem is that even if the prosecution set the stage and anticipated the crime, such alone is not enough. As a result, the entrapment arguments were usually unsuccessful. *U.S. v. Nickels* (7th Cir. 1974) 502 F.2d 1173; *U.S. v. Lazaros* (6th Cir. 1973) 480 F.2d 174; *U.S. v. Dowdy* (4th Cir. 1974) 479 F.2d 213. The case *sub judice* is more accurate when it holds that the conduct "smacks of entrapment," which of course, it does. There is also earlier dictum that if the interrogation was conducted only to set a trap for a perjury charge, then some relief could be granted. *Masinia v. U.S.*, (8th Cir. 1961) 296 F.2d 871. Certainly, only in the rarest cases will true entrapment be made out in a perjury case.

Other defendants have gone so far as to assert that virtual defendants should not be called before the grand jury at all. It is obvious, however, that it would be much too restrictive if there were an outright prohibition against receiving testimony from target figures. It is, consequently, none too surprising that this extreme contention has found no favor. *U.S. v. Wolfson* (2d Cir. 1968) 405 F.2d 779; *U.S. v. Capaldo* (2d Cir. 1968) 402 F.2d 79; *Kitchell v. U.S.* (1st Cir. 1965) 354 F.2d 715.

On the other hand, there is certainly judicial hostility to the needless calling of targets, especially if such be done only in the hope of obtaining perjurious testimony. *U.S. v. Del Toro* (2d Cir. 1975) 513 F.2d 656; *U.S. v. Dawkins* (5th Cir. 1973) 486 F.2d 1326; *U.S. v. Scully*, (2d Cir. 1955) 225 F.2d 113; *U.S. v. Chevoor* (D.C. Mass. 1975) 392 F.Supp. 436.

Others have urged that the Government should have an affirmative duty to give warning if it is known they are lying. This position would be difficult to administer since the U.S. may know there is a conflict, but less able to tell just who was lying. In any event, the point has gained no support. *U.S. v. Del Toro* (2d Cir. 1975) 513 F.2d 656; *U.S. v. Kokas* (7th Cir. 1972) 466 F.2d 567; *U.S. v. Scully* (2d Cir. 1955) 225 F.2d 113.

In what is perhaps a modified offshoot of the same position, the Third Circuit briefly required affirmative disclosure of the right to recant. *U.S. v. Lardieri* (3d Cir. 1974) 497 F.2d 317, withdrawn in 506 F.2d 319. It has not been adopted elsewhere. *U.S. v. Camporeale* (2d Cir. 1975) 515 F.2d 184; *U.S. v. Cuevas* (2d Cir. 1975) 510 F.2d 848.

The area in which there is a discernable trend is that of requiring the full panoply of the Miranda Warnings to any person called before the grand jury who is a target or in the position of being a virtual defendant.

Many of these same authorities also require or endorse a target warning, that is, advising such a witness expressly that he is a subject of the grand jury investigation.

The cases reflecting this trend include *U.S. v. Rangel* (5th

Cir. 1974) 496 F.2d 1054; *U.S. v. Wong* (9th Cir. 1974) ..... F.2d ..... (Pet. for Cert. Pending); *U.S. v. Winter* (2d Cir. 1965) 348 F.2d 204; *U.S. v. Parker* (7th Cir. 1957), 244 F.2d 943; *U.S. v. Scully* (2d Cir. 1955) 225 F.2d 113; *U.S. v. Chevoor* (D.C. Mass. 1975) 392 F.Supp. 436; *U.S. v. Prior* (D.C. Fla. 1974), 381 F.Supp. 870; *U.S. v. Pepe* (D.C. Conn. 1973) 367 F.Supp. 1365; *U.S. v. Kreps* (W.D. Wisc. 1972) 349 F.Supp. 1049; *U.S. v. McGinnis* (S.D. Tex. 1972) 344 F.Supp. 929; *U.S. v. Washington* (Dist. Col. Cir. 1974) 328 A.2d 98 (Pet. for Cert. Pending).

Other authorities reach different views, some reluctantly, but most upon the grounds that no witness should be entitled to lie with immunity. The point to the warnings, however, is not to condone false testimony, but to be as certain as one can be, that it is truly perjury rather than an honest mistake. The contra cases include *U.S. v. Cuevas* (2d Cir. 1975) 510 F.2d 848; *U.S. v. Braasch* (7th Cir. 1974) 505 F.2d 139; *U.S. v. Irali* (7th Cir. 1974) 503 F.2d 1295; *U.S. v. Pacente* (7th Cir. 1974) 503 F.2d 543; *U.S. v. Nickels* (7th Cir. 1974) 502 F.2d 1173; *U.S. v. Pommering* (10th Cir. 1974) 500 F.2d 92; *U.S. v. DiMichelle* (3d Cir. 1967) 375 F.2d 959; *U.S. v. Orta* (5th Cir. 1968) 253 F.2d 312; *U.S. v. Cleary* (2d Cir. 1959) 265 F.2d 459; *U.S. v. Andrews* (D.C. Conn. 1974) 370 F.Supp. 365; *U.S. v. Sweig* (S.D.N.Y. 1970) 316 F.Supp. 1148; *U.S. v. Ponti* (E.D. Pa. 1966) 257 F.Supp. 925.

(3) Recommended Warnings.

It is recommended that two warnings be given. The defendant should be told prior to the time of his testimony that he

is a subject of the investigation. This could be accomplished with no more than one sentence to be typed upon the subpoena. The purpose, of course, is to emphasize to the witness the importance to him of full, frank and accurate testimony. By providing such a warning in advance, the witness is afforded a reasonable opportunity to review his records and refresh his memory prior to his appearance. If such prior warning is given, and false testimony is still the result, there is a much more comfortable feeling that the perjury conviction was deserved.

The full Miranda Warning should also be given at or near the time of actual testimony. Certainly, it is true, as many courts point out, Miranda Warnings were created for in custody interrogations while a grand jury witness is not technically in custody. On the other hand, Miranda should apply whenever one has been deprived of his freedom in any significant way. *Mathis v. U.S.* (1968) 391 U.S. 1. It is the totality of the surrounding circumstances which bring Miranda into play, rather than any single mechanical event.

In a grand jury proceeding the attendance of the witness is compelled. He is isolated from his attorney, if he even has one. He is subjected to cross-examination by the prosecutor with no judge present. The aura and atmosphere of intimidations which lead to Miranda are all equally present. Just as Miranda was intended to insure statements were freely given, so should it be extended to help insure the statements are truthfully given.

(4) Administrative Burden.

Neither warning should pose any administrative difficulties

whatever. Indeed, quotations from reported cases indicate both Miranda and target warnings are already commonly given so the only real effect will be to make the practice uniform and provide a single standard. *U.S. v. Camporeale* (2d Cir. 1975) 515 F.2d 184; *U.S. v. Carson* (2d Cir. 1972) 464 F.2d 424; *U.S. v. Corallo* (2d Cir. 1969) 413 F.2d 1306; *U.S. v. Capaldo* (2d Cir. 1968) 402 F.2d 821; *Kitchell v. U.S.* (1st Cir. 1965) 354 F.2d 715; *U.S. v. Winter* (2d Cir. 1965) 348 F.2d 204.

The only possible adverse effect to the prosecution might be that some witnesses, on learning they were targets would refuse to testify. It is not believed, however, that this will be a serious problem. First, the central figures would already be aware that they were targets so that the official warning would be no great surprise. Their testimony could still be compelled by the grant of no more than use immunity. *Kastigar v. U.S.* (1972) 406 U.S. 441.

Secondly, as to the fringe and tangental targets, the reaction could be favorable in that they might well provide fullest cooperation in an effect to change their classification. This reaction can almost be predicted with certainty in that group against whom the abuse strikes the hardest, fringe defendants who were included as targets because of character, personality or attitude.

In sum, then, the full Miranda plus a prior target warning should provide a fair protection against overzealous prosecution with a bare minimum of inconvenience to either the Government or the grand jury function.

CONCLUSION

For the reasons set forth, this Court should affirm the decision below and ratify the requirement of a full Miranda warning and prior target warning to all witnesses called before a grand jury at a time when they are virtual defendants.

Respectfully submitted,

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